In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-724

ALBERT CORTELLESSO and RALPH ALTIERI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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Petitioners, Albert Cortellesso and Ralph Altieri, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered June 29, 1979. A Petition for Rehearing was addressed to and denied by that court on July 19, 1979 and mandate was issued July 26, 1979.

Citations to Petitions Below

The opinion of the Court of Appeals is reported as *United States* v. *Cortellesso et al.*, 601 F.2d 28, a copy of which is annexed hereto as Appendix C.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C., §1254(1).

Questions Presented

1. Did the warrants sufficiently describe the property authorized to be seized by use of generic terms, when a more particularized description was available?

2. May an affidavit used to secure a warrant be referred to for purposes of providing particularity if the affidavit does not accompany the warrant and the warrant does not use suitable words of reference which incorporate the affidavit?

Statement of the Case

Following an extensive period of conventional investigatory efforts directed at petitioner Cortellesso, on March 15, 1977 Special Agent Murphy of the FBI authored an affidavit in support of a government request for a court ordered interception of wire communication. Pursuant to the allowance of same, interceptions occurred from March 17 to April 1, 1977 and served as the basis for an affidavit authored by Special Agent Kennedy, incorporating the Murphy affidavit, on April 1, 1977.

These affidavits were submitted to a magistrate on April 1, 1977 in support of a successful application for two search warrants for petitioner Cortellesso's retail clothing store (the "Chi Chi's Ltd. . . ." warrant) and residence (the "2 Ash Lane . . ." warrant).

In the district court petitioners moved to suppress the physical evidence obtained at both locations when the warrants were executed on April 2, 1977 on the grounds that,

inter alia, the property descriptive clauses of the warrants were not sufficiently particularized as to the items to be seized in contemplation of the requirements of the Fourth Amendment. Petitioners did not contest that the affidavits taken together provided probable cause for the issuance of the warrants.

The information contained in the affidavits disclosed that the items sought could have been described as follows, and as the district court found (App. 198; Appendix A, herein), was precisely the information used to select the articles seized on April 2, 1977: "diamond(s)" (App. 43-45); "740 suits" (App. 44); "Indian Jewelry" (App. 46); "Pierre Cardin suits with vests" (App. 47); 25 "cashmere sports coats" (App. 47-48); "7 Oxford suite" (App. 48); "black suit(s)" (App. 48); "Ultra Suede sports jackets" (App. 49-50); "Halston" clothing (App. 50), and; "made in Korea" (App. 95, 154).

The property descriptive clause of the warrant authorizing the search of Chi Chi's Ltd. was for:

> "stolen goods, wares and merchandise valued in excess of $5,000 which have travelled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats . . . which are evidence of violations . . ."

and as to 2 Ash Lane,

> "stolen goods, wares and merchandise valued in excess of $5,000 which have travelled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats, jewelry . . . which are evidence of violation . . ."

The district court found that (a) the affidavits were not incorporated by reference in the warrants, (b) the affidavits were not annexed to the search warrants and (c) were not otherwise present when the warrants were executed. (App. 196-197; Appendix A and B herein). The district court found that the warrants failed to particularize described items to be seized and granted the motion to suppress. Pursuant to 18 U.S.C. §3731, the government appealed.

Reasons for Granting the Writ

I. The First Circuit Has Developed Criteria for Particularized Descriptions in Warrants That Is Contrary to Established Fourth Amendment Principles.

The court below has fashioned a standard of review for warrant property clause descriptions inconsistent with this Court's interpretations of the Fourth Amendment requirement that warrants shall "particularly" describe the "things to be seized." From *Marron* v. *United States,* 275 U.S. 192 (1927),

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant." 275 U.S. at 196,

to *Lo-Ji Sales, Inc.* v. *New York,* — U.S. —, 60 L.Ed.2d 920, 99 S.Ct. — (1979),

> "This search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant . . . against which the Fourth Amendment was intended to protect." 60 L.Ed.2d at 927,

this Court has maintained a continued sensitivity to the requirement and where First Amendment issues are involved, obligated "scrupulous exactitude" as the measure of compliance.

The effect of these authorities is that the "property clause" of any warrant either describes with sufficient specificity the items to be seized or it does not, and if the latter judgment is the way the analysis is remembered, the warrant is void as a general warrant. The methodology developed by the court below represents an impermissible compromise.

The origins of the First Circuit standard commenced with its decision in *Vitali* v. *United States,* 383 F.2d 121 (1st Cir. 1967). There, reviewing a claimed insufficiency of the *affidavit* supporting a search warrant, the court stated:

> "Where goods are of a common nature and not unique there is no obligation to show that the ones sought . . . necessarily are the ones stolen, but only to show circumstances indicating this would be likely . . . Probable cause does not mean proof beyond a reasonable doubt." 383 F.2d at 122.

The issue of the property clause was not raised at all. As was to be later concluded by the court below, however, this irrelevant probable cause equation served as the genesis for the standard ultimately pronounced in the instant case.

United States v. *Scharfman,* 448 F.2d 1352 (2d Cir. 1971), *cert. denied,* 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 789 (1972), represents the only, and insignificant, exception to what is otherwise a development exclusively in the First Circuit. There, the Second Circuit had the question squarely

before it, but the facts involved were distinguished and the court resolved the question by quoting the above-referenced excerpt from *Vitali,* 448 F.2d at 1354.

With the *Vitali-Scharfman* decisions now mutually supporting each other, notwithstanding the inconsistent premise in *Vitali,* the court below next decided *United States* v. *Klein,* 565 F.2d 183 (1st Cir. 1977) and *Montilla Records of Puerto Rico, Inc.* v. *Morales,* 575 F.2d 324 (1st Cir. 1978). These authorities alone serve as the decisional reference for the instant case, from which emerges the lower court's criteria to measure the sufficiency of particularity of descriptions.

Where generic descriptions are used, the lower court has formulated a two part test that only focuses on information provided to the magistrate. It is, by this view, irrelevant that such information supplied by affidavit is not incorporated by reference in the issued warrant, or does not physically accompany the executing officials, or does not become physically annexed to the warrant for reference during its execution. It is also, by this view, irrelevant what the property clause of the warrant states. If the lower court's analysis prevails, a property clause reciting merely "stolen things" would survive the particularity mandate if subsequently it could be demonstrated that back in the magistrate's file were contents of supporting affidavits that with editing would disclose specificity of description.

Should it be concluded that *Marron* v. *United States, supra,* and the terms of the Fourth Amendment permit an exception where generic descriptions are necessary as a practical matter, the result below is reached without appropriate regard for the Fourth Amendment interests sought to be protected. The reasoning evidenced in the decision can be fairly summarized as follows:

> ". . . two similar but significantly different tests . . . must be met before a magistrate may issue a valid warrant containing only a general description . . . . [F]irst, . . . the evidence presented to the magistrate must establish that there is reason to believe . . . a large collection of similar contraband is present on the premises to be searched, and second, that the evidence before the magistrate must explain the method by which the executing agents are to differentiate the contraband from the rest of defendant's inventory." 601 F.2d at 31.

The decision then proceeds to supply the facts available from the affidavits that satisfy the requirements of its first condition precedent, but as to the second of the criteria its disturbing conclusion is:

> ". . . that for all practical purposes the collection could not be precisely described for the purposes of limiting the scope of the seizure, *Spinelli* v. *United States,* 383 F.2d 871 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).[1] . . . . Accordingly, we believe that the affidavits established that the officer who applied for the search warrants could only have been expected to describe the generic class of items he sought." 601 F.2d at 31.

This departure from an emphasis on the warrant to an examination only of the affidavits thus requires merely a probable cause burden—and that a satisfaction of that

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[1] The generic class, *inter alia,* "bookmaking paraphernalia" description in *Spinelli* was closer to presumptive contraband in nature than the articles present here: "The specificity required for the seizure of goods whose identity is known, such as stolen goods, should not be demanded when officers are searching for such items as secreted gaming equipment, the identity of which cannot be specifically ascertained." 382 F.2d at 886.

burden cures vagueness in the property clause is a proposition without any authority except the First Circuit's own prior decisions.

By thus only focusing on the affidavits and the quantum of specificity they contain, the lower court's decision is understandably silent, "we need not decide the other issues presented," 601 F.2d at 30, as to what occurred on the execution of these warrants. The conduct, as testified to, of these events is illustrative of the dangers of the open-endedness that the First Circuit's standard would necessarily permit and in fact here occurred.

Numerous agents simultaneously commenced searches pursuant to these warrants at petitioner Cortellesso's home and clothing store. Of these two locations, Agents Murphy and Kennedy were, with other agents, at the residence, and, at least as was argued, they had what specifics there were in mind as authors of the supporting affidavits. Other agents at the clothing store testified they did not have any idea what they were supposed to seize. They did not have the affidavits and had never seen them, and the warrant provided no assistance at all. Their selection process was completed by taking directions from three attorneys present from the United States Attorney's office, two of whom assisted Agents Murphy and Kennedy in compiling the supporting affidavits. This *ad hoc* and after-the-fact selection process was a further ground for the district court's allowance of the motion to suppress. (Appendix A)

II. If the First Circuit Approach Is Correct, Its Application Should Be Approved Only in Exceptional Circumstances and After Exhaustion of Alternative Means.

The Fourth Amendment, ". . . no Warrants shall issue, but upon probable cause, . . . and particularly describing the . . . things to be seized," confers in integrity on the

warrant that is disregarded by the decision below. That "probable cause" support these warrants cannot be questioned. However, once the probable cause threshold has been crossed, the warrant itself had independent significance apart from the combined warrant process, i.e. "affidavit" plus "warrant."

That the conduct, product and content of the warrant and the warrant process here could have been more specific cannot, also, be questioned. While precise description was not possible, the particularized descriptions of the property known and sought, as has been demonstrated *supra*, could have been made more specific beyond the term "stolen." Where the opinion below concludes ". . . the affidavits established that the officer who applied for the search warrants could only have been expected to describe the generic class of items he sought," 601 F.2d at 32, it holds the erroneous view that there need be no further inquiry.

Petitioners urge that significant Fourth Amendment interests in the integrity of a warrant should be decided by something other than a good faith, best efforts analysis. Cognizant of the inherent difficulties of law enforcement when attempting to particularize items that are not contraband *per se*, and are known to be mingled with goods of a similar description of legitimate origin, the officers in this case should have:

1. incorporated by suitable terms of reference the affidavit in the warrant; and/or
2. supplemented the property description clause, as the district court found after an evidentiary hearing, was the method used for selection, *supra*; and/or
3. brought the affidavit with them when they conducted the search.

If either of the two latter alternatives had been utilized, there would not have occurred—as was found by the district court—an *ad hoc* post issuance selection process, and the concern of particularity in the midst of generic practicality would have been solved. These alternatives are neither difficult for compliance with nor frivolous compared to the wholesale disregard for the significance of the warrant that would result from a generic property exigent circumstance exception that petitioners' case at present represents. Other circuits have, as more particularly detailed *infra,* resolved this issue precisely as petitioners contend the analysis should be. *United States* v. *Womack,* 509 F.2d 368 (D.C. Cir. 1974), *cert. denied,* 422 U.S. 1022, 95 S.Ct. 2644, 45 L.Ed.2d 681 (1975); *United States* v. *Johnson,* 541 F.2d 1311 (8th Cir. 1976); *In Re Search Warrant Dated July 14, 1977,* 572 F.2d 321 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925, 55 L.Ed.2d 519, 98 S.Ct. 1491 (1978), *remand* — F.Supp. — (USDC–D.C.) 25 CrL 2525 (9/19/79).

III. The First Circuit's Collateral Reliance on Supporting Affidavits Is in Conflict With Decisions of the District of Columbia Circuit and the Eighth Circuit.

In the opinion below, the court has permitted reference to supporting affidavits to provide particularity of descriptions otherwise lacking on the face of the warrant, even though the affidavits did not accompany the warrants after they were issued and were not incorporated by reference in the language of the warrant.

The precise focus of its analysis is sufficiency of descriptions presented to the magistrate in the probable cause determination process:

> "... [the district court] ruled that since the affidavits presented to the magistrate were not appended to the warrants, the affidavits could not be used to provide the particularity it found lacking in the warrants. However, the Court should have considered whether the affidavits presented to the magistrate the justification which in *Klein* we deemed necessary to support the use of a generic description in a warrant." 601 F.2d at 32.

This First Circuit position is contrary to and in conflict with the Court of Appeals for the District of Columbia Circuit as expressed by that court in *United States* v. *Womack,* 509 F.2d 368 (D.C. Cir. 1974), *cert. denied,* 422 U.S. 1022, 95 S.Ct. 2644, 45 L.Ed.2d 681 (1975), and *In Re Search Warrant Dated July 14, 1977,* 572 F.2d 321 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925, 55 L.Ed.2d 519, 98 S.Ct. 1491 (1978), *remand* — F.Supp. — (USDC–D.C.) 25 CrL 2525 (9/19/79). That court in *Womack* stated

> "... there can be no serious claim that the warrant was impermissibly vague as to the items to be seized. The warrant incorporates by express reference the underlying affidavit attached thereto which quite specifically details the records and documents to be obtained in the search. Under these circumstances, we have held the warrant to meet the necessary specificity requirements." (fn. omitted), 509 F.2d at 382.

The above premise was the basis for that court's decision in *In Re Search Warrant Dated July 14, 1977, supra,* 572 F.2d 323-24, where the warrant's particularity was sustained by language in the warrant "which facts recited in the accompanying affidavit make out."

The First Circuit's position is also contrary to and in conflict with the Court of Appeals for the Eighth Circuit as expressed by that court in *United States* v. *Johnson,* 541 F.2d 1311 (8th Cir. 1976):

> ". . . the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. (Citation omitted.) Specificity is required in the warrant itself in order to limit the discretion of the executing officers as well as to give notice to the party searched. (Citation omitted.) However, where the affidavit is incorporated into the warrant, it has been held that the warrant may properly be construed with reference to the affidavit for purposes of sustaining the particularity of the premises to be searched, provided that a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein." (Citation omitted.) 541 F.2d at 1315.

This Court should consequently address the issue of whether or to what extent the affidavit and warrant can be used for cross-reference in mutual support under these circumstances, and whether there is a "generic description" exception to the Fourth Amendment constraints of specificity.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Cr. 77-111

UNITED STATES OF AMERICA,
v.
ALBERT A. CORTELLESSO,
RALPH ALTIERI

ALLOWANCE OF MOTION TO SUPPRESS

The Court: This matter is heard on a motion for suppression of evidence filed on behalf of defendants Albert Cortellesso and Ralph Altieri, with respect to an alleged unlawful search of the premises known as Chi Chi's Ltd., 1394 Douglas Avenue, North Providence, Rhode Island, a store belonging to the defendant Albert A. Cortellesso and a house at 2 Ash Lane, North Providence, Rhode Island, also belonging to defendant Albert A. Cortellesso, which occurred on April 2, 1977.

On April 1, 1977, the Magistrate issued three search warrants based upon affidavits made before the Magistrate by Special Agent Roderick J. Kennedy, Federal Bureau of Investigation. One of the warrants was directed to search the person of Albert A. Cortellesso, with respect to stolen jewels, including but not limited to diamonds, phone numbers, names and addresses of associates, bills of lading, manifests, inventory records, bills, sales records, bills of sale, and other identifying documents such as clothing labels and shipment papers which show proof of purchase, value and origin of shipment, which are evidence of violations of Title 18, United States Code, Section 2314, 2315 and 371. With respect to that warrant, the evidence is that the warrant was carried out but that no items were seized.

The Court is therefore required to address the other two warrants issued the same date by the Magistrate, one for the search of the premises known as Chi Chi's Ltd., a one-story business establishment of approximately 1,000 square feet, located in the premises at 1394 Douglas Avenue, North Providence, Rhode Island, with respect to, "stolen goods, wares and merchandise valued in excess of $5,000, which have traveled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats, inventory records, bills, sales records, bills of sale, and any document which shows proof of purchase, value and origin of shipment, which are evidence of violations of Title 18, United States Code, Sections 2314, 2315 and 371. This particular warrant does not incorporate by reference the affidavit which is the basis for the warrant. The second warrant in question relates to the same description of certain concealed property allegedly located at 2 Ash Lane in North Providence, Rhode Island.

The defendants contend that the descriptions contained in the warrants are inadequate in that they do not meet the requirements of the provisions of the United States Constitution which relate to this issue. In particular, the defendants argue that the Fourth Amendment requires that a search warrant "particularly" describe "the place to be searched" and the "things to be seized". Those are not words out of the statute or out of a decision of a District Court, or a Court of Appeals, or indeed the United States Supreme Court. Those are requirements that are imposed by the Fourth Amendment to the Constitution of the United States.

In general, the law is stated in *Marron* v. *the United States,* 275 U.S. 192 at 196, where the Court said, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." In general, that language has been pretty much literally applied. There are exceptions particularly where goods were of such a common nature that it was not possible to particularize further the items described in the warrant, or where the items themselves are per se illegal, such as bookmaking paraphernalia, and when prohibition was in vogue, alcoholic beverages.

The Court finds as a fact that the affidavit in support of the warrant did not accompany the warrant with respect to the search.

Furthermore, the officers executing the warrant were required to seek the advice and consultation of the United States Attorney for this District who was present at one of the locations, and another attorney for the Justice Department who at times was present at both locations, as well as the Agent for the Federal Bureau of Investigation, who had made the affidavit in support of the warrant.

The Court finds as a fact that the information available to the Government prior to the time that the warrant issued, was precisely the information that was used to select the items to be taken; that that information could well have been inserted in the warrant as limiting the extent of the search, and at least more particularize the description of the items to be taken, particularly the warrant with respect to Chi Chi's Ltd., which is a business establishment which, according to the testimony, there were hundreds and hundreds of items of clothing on the premises.

The Court recognizes that the Court of Appeals of the First Circuit has filed two Opinions since the time that these warrants issued, both of which in my opinion have a substantial bearing on the outcome of this matter. Those opinions could not have been known to the U.S. Attorney's office at the time that the warrants were obtained, and at the time that they were served. However, it is accepted

doctrine that the Court declares what the law was even though it may be back nobody knew what it was, at the time that something occurred, that generally decisions of appellate courts are not prospective but retroactive, and are deemed by some magic to have existed from the beginnings of the Constitution, at least.

In *United States* v. *Klein,* the Court quoted the *Marron* language which I have referred to, and with respect to the affidavits in two footnotes, said this in Footnote Number 3, "An affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant, and—this is in italics—the warrant uses suitable words of reference which incorporate the affidavit." (citing cases). In this case—the Court in that case observed that—the warrant makes no reference to the affidavit. There is also no evidence on the record that the affidavit accompanied the warrant. Here the evidence is that the affidavit did not in fact accompany the warrant. Thus, the affidavit cannot be used to provide particularity.

Going on to the next footnote, Footnote Number 4, "It is, of course, rudimentary that the validity of the warrant must be appraised by the facts revealed to the magistrate and not those later found to exist by executing officer." (citing cases). With respect to generic descriptions, the Court quotes from *Spinelli,* an Eighth Circuit decision, as follows, "When the circumstances of the crime make an exact description of the fruits and instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking." In this matter, the evidence is quite to the contrary, that there was information available which could have at least narrowed to some extent the categories of items to be taken upon execution of the warrant.

The principal difficulty with the forms of both of these two warrants, the search warrant at Chi Chi's Ltd., and

the search warrant at 2 Ash Lane, North Providence, is pointed up by the language in *United States* v. *Klein,* Slip opinion at Page 10. As I have already indicated, this opinion was published November 14, 1977, some months after the warrants were executed. The warrants themselves refer to certain concealed property, namely stolen goods, wares and merchandise. In *Klein,* the First Circuit said this in part, "A warrant for 'stolen', 'pirate', or 'illegal' goods, be they watches, drugs, clothing, or tapes does not become sufficiently particular by after the fact explanations as to how these products were differentiated from legal merchandise, when the seizures were carried out." Additionally, in the footnote on the same page, the Court says, "Furthermore, it is well settled that an affidavit cannot be rehabilitated in post-arrest hearing by information known to the agents but not disclosed to the Magistrate. Now I am not suggesting the information was not disclosed to the Magistrate. What information there was in the affidavit was disclosed to the Magistrate, was not carried over onto the face of the warrant, and was not included in the area of limitations as to what items were to be taken.

This Court is bound by the decisions of the First Circuit. It is bound by the *United States* v. *Klein.* It is bound by the First Circuit's opinion filed May 15, 1978, with respect to Montilla records.

It is this Court's opinion that it has no choice in this matter but to grant the motions of the defendants to suppress the warrants with respect to search of the premises at Chi Chi's Ltd., and also with respect to the search of 2 Ash Lane, dated April 1, 1977. Defendants may prepare and present a form of order. The Government may have an exception.

(s) Boyle, J.

June 30, 1978

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Cr. 77-111

UNITED STATES OF AMERICA,
v.
ALBERT A. CORTELLESSO,
RALPH ALTIERI

OPINION

BOYLE, FRANCIS J., District Judge

The United States has moved to reconsider the grant of Defendants' motions to suppress evidence obtained as the result of execution of search warrants dated April 1, 1977. The motions to suppress were granted, after hearing, by Decision of the Court on June 30, 1978. It is stipulated by the United States that the Motion for Reconsideration is directed solely to a search warrant dated April 1, 1977, relating to the premises located at 2 Ash Lane, North Providence, Rhode Island, described in the warrant as a single family dwelling, white in color with an attached garage on the corner of Ash Lane and Bicentennial Way, North Providence. The warrant directs the seizure of certain property:

> namely stolen goods, wares, and merchandise valued in excess of $5000 which have travelled in interstate commerce, in particular, men's suits, sports jackets, women's boots, leather coats, fur coats, raincoats, jewelry, trucking manifests, bills of lading, labels to clothing, inventory records, bills, sales records, bills of sale, and any documents which shows proof of purchase, value and origin of shipment, telephone numbers, and names and addresses of associates

> which items are evidence of violation of Title 18, United States Code, Sections 2314, 2315 and 371;

The evidence submitted at the June 30, 1978, hearing established that the Defendant Cortellesso is engaged in a retail clothing business known as "Chi Chi's Ltd." located on Douglas Avenue, in the Town of North Providence. Further, the evidence established that upon entering the basement at 2 Ash Lane, the residence of the Defendant Cortellesso, agents discovered a virtual warehouse of wearing apparel.

On the basis of *United States* v. *Klein,* 565 F.2d 183 (1st Cir. 1977), and *Montilla Records of Puerto Rico, Inc.* v. *Morales,* 575 F.2d 324 (1st Cir. 1978), the court held it to be its duty to grant Defendants' motions to suppress. In particular, the court relied on the language in *Klein,* 565 F.2d at 189, where the court stated:

> "A warrant for 'stolen', 'pirate', or 'illegal' goods, be they watches, drugs, clothing, or tapes does not become sufficiently particular by after the fact explanations as to how these products were differentiated from legal merchandise when the seizures were carried out."

The sole authority for the agents was the warrant. The evidence establishes that the Affidavit in Support of the warrant was not incorporated by reference in the warrant and was not served with the warrant.

The United States now contends that a portion of the warrant is valid relating to inventory records, bills, sales records, bills of sales and any other document which shows proof of purchase, value or origin of shipment, and, that having entered under a valid warrant and with hundreds of articles of clothing in plain view in Defendant Cortellesso's basement, the seizure is valid. It has been held that an unlimited search cannot be partially valid. ***United States*** v. ***Burch,*** 432 F.Supp. 961 (D.Del. 1977). There is

no purpose in these circumstancse to adopt either view.

The Government's contention would require this Court to rewrite the search warrant, and would require the Court to ignore the plain language of the warrant. The warrant relates to certain property, namely, stolen goods, wares and merchandise valued in excess of $5,000 which had traveled in interstate commerce including a series of items of personal wearing apparel, jewelry, and documents relating to proof of purchase, value and origin of shipment. It is the Government's contention, in effect, that the description "stolen" does not apply to inventory records, bills, etc., but is limited to the items of tangible personal property referred to in the affidavit. If the documents sought were not "stolen" it is difficult to conceive of a legitimate reason, based on the affidavit, why they were subject to seizure. A fair reading of the warrant requires that the Government's argument be rejected. The differentiation of items commanded by the warrant must be a subject of the executing officer's opinion of whether or not they were "stolen," and, the warrant is fatally defective. *Marron* v. *United States,* 275 U.S. 192, 196 (1927).

For the foregoing reasons, the Government's Motion for Reconsideration is denied, and Defendants may prepare and present a form of Order.

So ORDERED.

(s) FRANCIS J. BOYLE
United States District Judge
September 8, 1978.

APPENDIX C

United States Court of Appeals
For the First Circuit

[28]

No. 78-1446

UNITED STATES OF AMERICA,
APPELLANT,
v.
ALBERT A. CORTELLESSO, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. FRANCIS J. BOYLE, *U.S. District Judge*]

Before
ALDRICH and CAMPBELL, *Circuit Judges,*
and CAFFREY, *District Judge.**

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[29] Frank J. Marine., Atty., Dept. of Justice, Washington, D.C., with whom Paul F. Murray, U.S. Atty., Edwin J. Gale, Providence, R.I., and Richard Gregorie, Sp. Attys., Boston Strike Force, Dept. of Justice, Boston, Mass., and William G. Otis, Atty., Dept. of Justice, Washington, D.C., were on brief, for appellant.

Kirk Y. Griffin, Boston, Mass., with whom John Tramonti, Jr., Providence, R.I., and Griffin & Higgins, Boston, Mass., were on brief, for defendants, appellees.

Argued March 6, 1979
Decided June 29, 1979

CAFFREY, *District Judge.* This is an appeal taken by the United States pursuant to provisions of 18 U.S.C. §3731

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* Of the District of Massachusetts, sitting by designation.

from orders of the District Court suppressing evidence. The first of these orders, entered June 30, 1978, suppressed evidence seized pursuant to search warrants issued April 1, 1977. A second order, entered on October 4, 1978, suppressed evidence seized pursuant to search warrants issued April 4, 1977 on the theory that the April 4 warrant was obtained as a result of [30] observations made and information learned while executing the April 1 warrants which the District Court had already declared to be unlawful. Thus this case turns on the validity of the April 1 warrants and the orders suppressing evidence obtained thereunder.

Affidavits of Special Agents Roderick J. Kennedy and Bernard Murphy of the Federal Bureau of Investigation furnished the basis for warrants to search and seize for

> stolen goods, wares and merchandise valued in excess of $5,000 which have travelled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats, inventory records, bills, sales records, bills of sale and any document which shows proof of purchase, value and origin of shipment, which are evidence of violations of Title 18, United States Code, Sections 2314, 2315 and 371.[1]

from Chi Chi's Ltd. a clothing store located in Providence, Rhode Island, owned by Albert A. Cortellesso, a/k/a Chi Chi, a/k/a Cheech, and from his home in North Providence, Rhode Island. FBI agents executed the warrants with the assistance of a Special Attorney from the United States Department of Justice and an Assistant United States Attorney. They entered the premises of Chi Chi's Ltd. and seized from clothing racks 23 Pierre Cardin suits, 5 suede sport jackets, and 25 cashmere coats plus other items which are

[1] This language is from the text of the search warrant authorizing a search of Chi Chi's Ltd. The warrant authorizing a search of defendant's home is essentially the same with differences not here relevant.

not the subject matter of the indictment. On the same day, FBI agents, under the supervision of Special Agent Kennedy, entered Cortellesso's home and there they seized two handguns and some children's clothing bearing the name "Health Tex" along with other items which are not in issue. Goods observed but not seized on April 1 provided the basis for the April 4 warrant under which the agents returned to Cortellesso's home and store and seized from Chi Chi's Ltd. articles named in the April 4 warrant.

Thereafter, Cortellesso and Ralph Altieri, his son-in-law, an employee at Chi Chi's Ltd., were indicted for conspiracy to possess and conceal stolen goods which had moved in interstate commerce in violation of 18 U.S.C. §§371, 659, 2315, and with receiving and concealing goods stolen from an interstate shipment in violation of 18 U.S.C. §§ 2315, 2. Cortellesso was additionally charged with possession of goods stolen from an interstate shipment in violation of 18 U.S.C. §659, with removing property before its seizure in violation of 18 U.S.C. §2232, and with possession of a firearm as a previously convicted felon in violation of 18 U.S.C. App. 1202(a)(1).

The District Court granted defendant's motion to suppress on the ground that the April 1 warrants failed to particularly describe the items to be seized. In so holding the District Court relied chiefly on *Montilla Records of Puerto Rico, Inc* v. *Morales,* 575 F.2d 324 (1st Cir. 1978) and *United States* v. *Klein,* 565 F.2d 183 (1st Cir. 1977).

On appeal, the government raises several arguments. Because we reverse and hold that the warrants in question did meet the particularity requirement of the Fourth Amendment and consequently are valid, we need not decide the other issues presented to us.

We first turn to the question whether the generic description contained in the April 1 warrants was of sufficient particularity. The government urges that this case falls

squarely within *Vitali* v. *United States,* 383 F.2d 121, 122 (1st Cir. 1967), wherein we stated "[w]here goods are of a common nature and not unique there is no obligation to show that the ones sought . . . necessarily are the ones stolen, but only to show circumstances indicating this to be likely." The government contends that the circumstances of the case at hand are quite different from those of *Montilla Records* and *Klein.* We agree.

In *United States* v. *Klein, supra,* the warrant authorized seizure of "certain 8-track electronic tapes and tape cartridges which [31] are unauthorized 'pirate' reproductions." Judging the sufficiency of that warrant on the basis of the facts presented to the magistrate, we concluded that neither the warrant nor its supporting affidavit assured the magistrate that the executing officers would be able to differentiate a pirate reproduction from a legitimate eight-track tape. The evidence before the magistrate established that an aural comparison and an investigation of copyrights would aid the executing officer in determining which were pirate tapes, but that this comparison could only be done after the fact. Just as significantly, there was no evidence before the magistrate to establish that there was a large collection of pirated tapes in the defendant's store. Consequently, we ruled that the evidence available to the magistrate was inadequate to assure him that authorized tapes would not be seized.

In *Montilla Records of Puerto Rico, Inc.* v. *Morales, supra,* the evidence established that there was probable cause to believe that Montilla was engaged in the illegal manufacture only of recordings bearing a Motown label yet the warrant in that case authorized the seizure of "sound recordings including but not limited to records, cartridges and cassettes which have been manufactured from sound recordings protected by the Copyright Act without the permission of the sound recordings copyright

owners . . . ." We noted that the evidence before the magistrate failed to show that Motown production constituted a significant part of Montilla's output or that Montilla was a "pirate manufacturer." Because of the likelihood that authorized recordings also would be seized, we again required greater particularity in the warrant.

We are unable to find anything in either *Montilla Records* or *Klein* which suggests that a generic description can never pass constitutional muster. To the contrary, in *Klein, supra* at 187, we recognized that at least in some cases generic descriptions are sufficient. *Eg., United States* v. *Scharfman,* 448 F.2d 1352 (2d Cir. 1971), *cert. denied,* 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 789 (1972); *United States* v. *Vitali, supra*; *United States* v. *Averell,* 296 F.Supp. 1004 (E.D.N.Y. 1969). Concomitant with that recognition, we formulated two similar but significantly different tests which must be met before a magistrate may issue a valid warrant containing only a generic description. In *Klein* we required first, that the evidence presented to the magistrate must establish that there is reason to believe that a large collection of similar contraband is present on the premises to be searched, and second, that the evidence before the magistrate must explain the method by which the executing agents are to differentiate the contraband from the rest of defendant's inventory. It is well-settled that under the warrant clause of the Fourth Amendment an impartial magistrate must ascertain that the requisite standard is met prior to the issuance of a search warrant. *See, e.g., Mincey* v. *Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The facts recited in the affidavits tendered to the magistrate in support of the application for a warrant in *Klein* and in *Montilla Records* failed to meet the two-part standard enunciated in *Klein.*

In the instant case, however, an examination of the

record establishes that the magistrate was well justified in finding on the basis of the evidence before him that a description in generic terms was adequate. The warrants when viewed against the facts contained in the supporting affidavits were not impermissibly broad.

First, the affidavits presented to the magistrate established a specific and detailed foundation for the belief that a large collection of similar contraband was present on the premises to be searched. The affidavits contained facts derived from conversations of agents with informants and from telephone calls intercepted under the authority of a wiretap which calls corroborated information furnished by the informants. The affidavits revealed that approximately 740 suits each worth "a buck and a quarter" ($125.00), stolen from a truck in New York City, were on the [32] premises of Chi Chi's Ltd., as well as women's leather boots, slacks, dresses, raincoats, men's short leather jackets, Indian jewelry, Pierre Cardin suits, oxford suits and cashmere sportcoats. In addition, the affidavits established a reasonable belief that Cortellesso dealt with stolen property, used his home as a warehouse for stolen items, used his store for the sale of those items, and that he sold clothing at slightly more than one-third the clothing's known value and sold other items at substantially less than their known value. Thus, in contrast to *Montilla Records* and *Klein* where there was no evidence presented to the magistrate to support the conclusion that stolen goods constituted a dominant or even significant part of the inventory, here the record affords an ample basis for the magistrate not only to believe that stolen items constituted a dominant part of the goods on the premises, but also to conclude that Cortellesso maintained Chi Chi's Ltd. for the purpose of disposing of a large collection of stolen

goods through a facade of legitimacy. *See, United States* v. *Scharfman, supra* at 1355.

Although the District Court's oral ruling shows that it was cognizant of our decisions in *Klein* and *Montilla Records,* it ruled that since the affidavits presented to the magistrate were not appended to the warrants, the affidavits could not be used to provide the particularity it found lacking in the warrants. However, the Court should have considered whether the affidavits presented to the magistrate the justification which in *Klein* we deemed necessary to support the use of a generic description in a warrant. An examination of the affidavits in light of the two tests articulated in *Klein* satisfies us that they clearly establish not only that a large collection of similar contraband was on the premises, thereby making it likely that the goods to be seized would be stolen goods, *see, Vitali* v. *United States, supra,* but also that for all practical purposes the collection could not be precisely described for the purpose of limiting the scope of the seizure, *Spinelli* v. *United States,* 382 F.2d 871, 886 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The affidavits revealed that labels had been removed from the Pierre Cardin suits so that a more precise description would not have assisted the officer in the field and, that with respect to other stolen items, only a generic description was known. Accordingly, we believe that the affidavits established that the officers who applied for the search warrants could only have been expected to describe the generic class of the items he sought. *See James* v. *United States,* 416 F.2d 467, 473 (5th Cir. 1969), *cert. denied,* 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87 (1970); *United States* v. *Scharfman, supra*; *Spinelli* v. *United States,* 382 F.2d 871 (8th Cir. 1967), *rev'd on other*

grounds, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 687 (1969). We remain fully mindful of the United States Supreme Court's admonition in *United States* v. *Ventresca,* 380 U.S. 102, 108-109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), that warrants are to be tested "in a common-sense and realistic fashion" and not in a hypertechnical manner. *Hàefeli* v. *Chernoff,* 526 F.2d 1314, 1319 (1st Cir. 1975). Under the foregoing circumstances, a precise description of the goods to be seized became a practical impossibility. Moreover, the affidavits did not leave the magistrate speculating whether the executing officers could differentiate the stolen goods from the legitimate inventory since there was a great likelihood that the goods to be seized would be indeed stolen. *See, Vitali* v. *United States, supra.*

In *Delaware* v. *Prouse,* — U.S. —, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the United States Supreme Court reiterated:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law-enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .'" ' *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978), quoting *Camara* v. *Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed. 2d 930 (1967).

[33] Under the circumstances of this case, there was little likelihood of a violation of personal rights. *See, United States* v. *Johnson,* 541 F.2d 1311, 1313 (8th Cir. 1976).

Accordingly, we reject the District Court's conclusion that the April 1 search warrant was not sufficiently particularized to pass constitutional muster. In our view, the portion of the warrant describing stolen goods was ade-

quately particularized when evaluated under the standards set out in *Klein.*

We likewise agree with the appellant's contention that the warrant's description of documents and papers to be seized was adequate. A general search for inventory records, sales records, and bills of sales was not authorized by the warrant. Rather the warrant directed search and seizure only of documents which are evidence of violations of 18 U.S.C. §§2314, 2315 and 371. In a similar situation, the Second Circuit stated "[i]t was entirely reasonable . . . for the magistrate to conclude that books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of . . . garments through a facade of legitimacy." *United States* v. *Scharfman, supra* at 1355. Accord, *Haefeli* v. *Chernoff, supra* at 1319. We hold that the warrant contained a description of evidentiary material subject to seizure, *e.g., Warden* v. *Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *United States* v. *Damitz,* 495 F.2d 50, 56 (9th Cir. 1974), adequate to enable the executing officer to distinguish reliably the documents to be seized. Several cases have upheld document descriptions nearly verbatim to that describing the documents to be seized in the April 1 warrant involved herein. *E.g., Andresen* v. *Maryland,* 427 U.S. 463, 481 n. 10, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *United States* v. *Jacobs,* 513 F.2d 564, 567 (9th Cir. 1974); *United States* v. *Scharfman, supra* at 1355.

Finally, we turn to the District Court's suppression of the evidence seized pursuant to the April 4 warrant as constituting fruits of the search conducted pursuant to what the District Court considered to be the illegal April 1 warrants. The record establishes that while executing the April 1 warrants the agents discovered items not contained in the warrants which they had reason to believe were evidence of other crimes. The agents then sought and

obtained the April 4 warrants to seize those additional items. Thus, the seizure of items pursuant to the April 4 warrant may be justified on the basis of the search conducted pursuant to the April 1 warrants which we have held herein to be valid. *See, United States* v. *Gordon,* 421 F.2d 1068, 1072, *cert. denied,* 398 U.S. 927, 90 S.Ct. 1816, 26 L.Ed.2d 89 (1970). Accordingly, we hold that a seizure of items pursuant to the subsequent warrant issued upon information learned by FBI agents executing the prior lawful search is valid. *See United States* v. *Gordon, supra* at 1072-73.

Reversed and remanded for further proceedings not inconsistent herewith.

No. 79-724

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT CORTELLESSO AND RALPH ALTIERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-30) is reported at 601 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on July 19, 1979. The petition for a writ of certiorari was filed on November 5, 1979, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the challenged search warrants described the property to be seized with sufficient particularity.

STATEMENT

1. In an indictment filed in the United States District Court for the District of Rhode Island, petitioners were charged with conspiring to possess and conceal stolen goods moving in interstate commerce, in violation of 18 U.S.C. 371, 659 and 2315, and with receiving and concealing goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315 and 2 (A. 72). [1] Petitioner Cortellesso also was charged with possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659, with removing property before its seizure, in violation of 18 U.S.C. 2232, and with possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. App. 1202(a)(1).

a. After the indictment was filed, petitioners moved to suppress evidence that had been seized from petitioner Cortellesso's home and from his clothing store under warrants issued on April 1 and 4, 1977. The affidavit submitted in support of the search warrants issued on April 1, 1977, stated that three confidential informants of proven reliability knew from personal observations and conversations with petitioner Cortellesso that he used his clothing store to conduct an illegal fencing operation and used his home as a "warehouse" for his store (A. 21, 24-25, 29-30, 36, 49). The affidavit also summarized several telephone conversations intercepted (pursuant to a prior court order) at petitioner Cortellesso's store. These conversations indicated that

[1] "A." refers to the Appendix filed in the court of appeals.

petitioner was about to receive a shipment of stolen clothing consisting of Pierre Cardin suits (from which the labels had been removed), 25 cashmere sport coats and a large load of "ultra suede" sports jackets. The affidavit stated that further investigation had established that the anticipated shipment of stolen goods had arrived (A. 47-50). Based on these and other facts detailed in the affidavit, the magistrate issued warrants authorizing the search of petitioner Cortellesso's store and home and the seizure of stolen "men's suits [and] sports jackets" which had traveled in interstate commerce (Pet. 3).

b. Federal agents executed the warrant at petitioner's clothing store on April 2, 1977. They seized 23 Pierre Cardin suits, 5 suede sport jackets, and 25 cashmere sport coats (A. 83). Labels in some of the Pierre Cardin suits had been totally removed, while others had been taken out but sewed back in (A. 87, 169, 177-178).[2] The agents did not seize "hundreds and hundreds" of other items and articles of clothing that were stocked at petitioner's store (A. 85).

The warrant for the search of petitioner Cortellesso's home was also executed on April 2, 1977. During that search, agents seized two handguns and other items not listed in the warrant after they learned from the National Crime Information Center and a local police department that the items were stolen (A. 141-143).[3] The agents, however, did not seize a large quantity of other clothing,

[2] Other items unrelated to this case were also seized during this search. Petitioners conceded in the court of appeals (Br. 15-16) that these other seizures do not affect the legality of the seizures of the clothing that is here in dispute. See also Pet. App. 22-23.

[3] These seizures are not challenged here (Pet. App. 23).

not mentioned in the warrant, which subsequent investigation established was stolen from interstate shipments (A. 60-63, 144-146, 163-165).

c. On the basis of their observation of additional stolen goods during the execution of these warrants, the agents obtained additional warrants on April 4 and again searched petitioner Cortellesso's store and home. Various items of clothing listed in the April 4 warrants were seized from Cortellesso's store (A. 71). No additional property was seized from Cortellesso's home, however, because the allegedly stolen property had been removed (A. 75).

2. After a hearing, the district court granted petitioner's motion to suppress the evidence seized pursuant to the April 1 search warrants. The court concluded that the warrants did not describe the goods to be seized with sufficient particularity (Pet. App. 15-17). The district court also concluded that the evidence seized pursuant to the April 4 search warrants must be suppressed as the fruits of the earlier, unlawful search (A. 226-233).

On appeal, the court of appeals reversed and remanded the case for further proceedings (Pet. App. 21-30). The court concluded that the description in the warrant of the goods to be seized was as precise and particular as the circumstances permitted (Pet. 27-28).

ARGUMENT

1. Petitioners seek review of an interlocutory ruling that may be made moot by further proceedings. The judgment that petitioners challenge is not a conviction, but merely a ruling on the admissibility of evidence at their future trial. The court of appeals' decision places petitioners in no different position than if the district court had ruled against them in the first instance. Since

such a ruling would not have been appealable by petitioners as an interlocutory order (*DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940)), review of the court of appeals' decision at this time would be premature. If petitioners are acquitted at trial, their claim will be moot. If, on the other hand, petitioners are convicted, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment against them.

2. In any event, the court of appeals correctly held that the challenged warrants adequately described the property to be seized. The decision in this case does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

a. The April 1, 1977, search warrant authorized the agents to seize the following property from petitioner Cortellesso's clothing store (A. 8):[4]

> Stolen goods, wares and Merchandise valued in excess of $5,000 which have travelled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats, inventory records, bills, sales records, bills of sale and any document which shows proof of purchase, value and origin of shipment, which are evidence of violations of Title 18, United States Code, Section 2314, 2315 and 371.

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[4]The April 1 search warrant for petitioner Cortellesso's home described the property to be seized in virtually identical terms (A. 9). Petitioners do not challenge the adequacy of the description in the April 1 warrants of the books and records subject to seizure. They also do not contest the sufficiency of the description of property in the April 4 warrants.

Petitioners contend (Pet. 3, 9) that the description of property to be seized in the search could have been made more specific by including the information that the stolen goods included *Pierre Cardin* men's suits and *cashmere* and *ultra suede* sport jackets. Petitioners argue that, without this additional information, the April 1 search warrants are invalid because they do not describe the property to be seized with sufficient particularity.

But the Fourth Amendment does not, as petitioners contend, require that a search warrant contain the most exacting description conceivable. It is sufficient that the description permits the agents reasonably to ascertain and identify the items to be seized. See, *e.g.*, *Steele* v. *United States No. 1*, 267 U.S. 498, 503 (1925); *Anglin* v. *Director*, 439 F. 2d 1342, 1347 (4th Cir.), cert. denied, 404 U.S. 946 (1971); *Gurleski* v. *United States*, 405 F. 2d 253, 257 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969).[5] The search warrants challenged by petitioners

[5]Petitioners' reliance (Pet. 4-5) on *Lo-Ji Sales, Inc.* v. *New York*, No. 78-511 (June 11, 1979), is misplaced. The defect in the warrant in *Lo-Ji Sales* was that it "did not purport" to describe the materials to be seized with particularity and left it entirely "to the discretion of the officials conducting the search to decide what items were obscene * * *" (slip op. 5). By contrast, the warrant in this case limited the scope of the goods to be seized to particular types of clothing and other goods suspected of being transported in violation of federal laws (Pet. App. 28). Moreover, this Court has observed that the particularity requirement is more stringent when the things to be seized are not stolen goods but "are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas*, 379 U.S. 476, 485 & n.16 (1965).

Petitioners also err in interpreting *Marron* v. *United States*, 275 U.S. 192, 196 (1927), to require that the descriptions in the warrant be so exacting that no judgment whatever need be exercised by the officers executing the warrant (Pet. 4). Petitioners' interpretation of *Marron* is both unrealistic and contrary to this Court's recognition that, in appropriate cases involving the seizure of stolen goods or

provided, in relevant part, that only stolen men's suits and sport jackets that had travelled in interstate commerce and were located at petitioner Cortellesso's home and place of business were to be seized. The court of appeals correctly determined that, in the circumstances of this case, this description was sufficiently particular and concrete to guide the officers in executing the warrant (Pet. App. 26-28).[6]

In the first place, as the court of appeals concluded, further particularization in the warrant was "a practical impossibility" (Pet. App. 28):

> The affidavits revealed that labels had been removed from the Pierre Cardin suits so that a more precise description would not have assisted the officer in the field and, that with respect to other stolen items, only a generic description was known. Accordingly, we believe that the affidavits established that the officers who applied for the search warrants could only have been expected to describe the generic class of the items he [*sic*] sought [*id.* at 27].

contraband, "generalized [descriptions may] pass constitutional muster * * *." *Stanford* v. *Texas*, *supra*, 379 U.S. at 486, citing *Steele* v. *United States No. 1*, *supra*, 267 U.S. at 504. See also *Andresen* v. *Maryland*, 427 U.S. 463, 483 (1976).

[6]Petitioners' contention (Pet. 8) that the "agents at the clothing store testified they did not have any idea what they were supposed to seize" is unsupported. Petitioners have not pointed to, and we have not found, any such testimony in the record. What the record shows is that the Justice Department attorney who helped draft the April 1 search warrants carefully supervised the agents executing the search warrant at the store (A. 82, 90, 171, 180), and the agents did not seize any property without the authorization of the attorneys in charge of the investigation (A. 93, 108, 114, 126, 129-130, 173-174, 188).

Moreover, further particularization was unnecessary because, as the court of appeals stated, "the affidavits presented to the magistrate established a specific and detailed foundation for the belief that a large collection of similar contraband was present on the premise to be searched," and "the affidavits did not leave the magistrate speculating whether the executing officers could differentiate the stolen goods from the legitimate inventory since there was a great likelihood that the goods to be seized would be indeed stolen." In these circumstances, the particularity requirement of the Fourth Amendment is satisfied by a generic description of the stolen goods because it is highly likely that the items seized "would be indeed stolen," and there is an accordingly small likelihood of erroneous seizure.[7] See, *e.g.*, *United States* v. *Scharfman*, 448 F. 2d 1352, 1354-1355 (2d Cir. 1971); *Vitali* v. *United States*, 383 F. 2d 121, 122 (1st Cir. 1967); *James* v. *United States*, 416 F. 2d 467, 473 (5th Cir. 2969), cert. denied, 397 U.S. 907 (1970); *Smith* v. *United States*, 321 F. 2d 427, 430 (9th Cir. 1963).

b. Finally, we note that the court of appeals did not hold, as petitioners contend (Pet. 6), that the description on the face of the warrant is irrelevant in determining whether it is sufficiently particular. Nor did the court hold, as petitioner states (Pet. 10), that the supporting affidavit could "provide particularity of descriptions

[7]These theoretical probabilities are in fact borne out in this case. From the entire inventory of petitioner Cortellesso's clothing store, the agents seized only 25 cashmere coats, 23 Pierre Cardin suits (with indications that the labels had been removed) and 5 suede sport coats. This law enforcement activity is hardly reminiscent of the general ransacking of homes by officers of the Crown under writs of assistance in the Eighteenth Century. Cf. *Lo-Ji Sales, Inc.* v. *New York*, *supra*, slip op. 5.

otherwise lacking on the face of the warrant, even though the affidavits did not accompany the warrants after they were issued and were not incorporated by reference in the language of the warrant." To the contrary, the court of appeals agreed that the sufficiency of the warrant's description must be determined by examination of the warrant itself (Pet. App. 27). The court held only that, on the facts and circumstances of this case, the affidavit showed that it was appropriate and necessary to utilize a generic description of goods to be seized under the warrant and that a more specific description was infeasible (*ibid.*). The decision of the court of appeals thus does not, as petitioners contend (Pet. 11-12), conflict with the decisions in *In Re Search Warrant Dated July 14, 1977*, 572 F. 2d 321 (D.C. Cir. 1977), cert. denied, 435 U.S. 925 (1978), *United States* v. *Johnson*, 541 F. 2d 1311 (8th Cir. 1976), and *United States* v. *Womack*, 509 F. 2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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